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CHIN SIN LAN

v.

DELTA FINANCE BHD

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HIGH COURT SABAH & SARAWAK, MIRI

SULAIMAN DAUD JC

[NO: 29-490-99(MR)]

27 APRIL 2001

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BANKRUPTCY: *Capacity of bankrupt - Sanction of official assignee - Whether necessary - Challenging judgment upon which bankruptcy petition was founded - Bankruptcy Act 1967, s. 38(1)(a)*

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BANKRUPTCY: *Opposition to petition - Notice of intention - Requirements of - Judgment debtor's name - Statements in petition which are being disputed - Affidavit affirmed prior to notice - Notice of motion supported by affidavit - Defective notice, whether curable - Bankruptcy Rules 1969, rr. 18, 117*

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This appeal was against the decision of the deputy registrar dismissing the judgment debtor's notice of intention to oppose the creditor's petition and subsequently granting adjudication and receiving orders against the debtor. Counsel for the petitioning creditor raised a preliminary objection in respect of the *locus standi* of the debtor's solicitor to act for the debtor and the debtor's legal capacity to appoint counsel and maintain an action sans the prior sanction of the official assignee as per s. 38(1)(a) of the Bankruptcy Act 1967 ('the Act'). The contentious issues raised were: (i) the debtor's affidavit dated 25 March 2000 ('1st affidavit') was bad in law for want of a counterclaim or set-off or cross-demand; (ii) the notice of intention to oppose the petition filed by the debtor's solicitor ('1st notice') was void for non-compliance with Form 16 of the Bankruptcy Rules 1969 ('the Rules'); and (iii) the notice under r. 117 of the Rules ('2nd notice') was void for non-compliance with the Rules.

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Held:

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[1] The requirement of prior sanction envisaged by s. 38(1)(a) of the Act was inapplicable to the instant case as the bankrupt clearly sought to challenge the judgment which formed the very foundation of the bankruptcy action on the grounds that it was illegal, null and void and the amount claimed was excessive and contrary to judgment. If allowed, the appeal would effectively render all orders made prior thereto including the receiving and adjudication orders null and void. In any event, the application had no nexus to any matter which had been vested in the official assignee to warrant requirement of its prior sanction. The preliminary objection was thus devoid of merit. (p 270 b-e)

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- [2] The debtor's 1st affidavit was intended to oppose the creditor's petition and came within the purview of r. 117 of the Rules which required that such notices be made in the prescribed form and in the judgment debtor's own name. The debtor's 1st affidavit in itself did not constitute a notice of intention to oppose the petition although the grounds for such opposition were set out therein. The debtor also ran foul of the Rules by issuing the notice in the name of his solicitor and not in his name personally. (pp 271 h & 272 a-b & g) a
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- [3] The 2nd notice adopted the prescribed format but neglected to specify the statements in the petition which the debtor intended to deny or dispute. Instead, the 1st affidavit was relied upon for grounds in support of the opposition to the grant of the receiving and adjudication orders. It was apparent that the 1st affidavit filed five weeks prior to the 2nd notice was never intended to be used in support of the 2nd notice and could not be accepted as such. Thus the 2nd notice though regular and in compliance with the requirements of r. 117 of the Rules stood unsupported. (p 273 a-e) c
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- [4] The debtor had failed to comply with r. 18 of the Rules and thus rendered his affidavit in opposition void and bad in law because unless otherwise directed by the court, challenges to a creditor's petition or bankruptcy notice other than a counter-claim, set-off or cross demand must necessarily be made by filing a notice of motion supported by an affidavit. Such non-compliance was a breach of a mandatory rule and was a formal defect which was incurable. The absence of a notice of motion and a supporting affidavit proved fatal to the debtor's cause. (pp 274 h & 275 a-b) e
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- [5] The discrepancy in respect of the actual amount due or in the judgment should have been raised at the bankruptcy stage within the time frame stipulated therein and not at this belated stage of the proceedings. (p 275 c-e)
- [6] The debtor could not be allowed to challenge the validity of the judgment to which the bankruptcy notice related or the subsequent receiving and adjudication orders by using the same notice and affidavits which had been irregularly made. Insofar as the official assignee was concerned there was nothing in the Act or the Rules that required the official assignee's confirmation that the bankruptcy papers were in order prior to the grant of the receiving and adjudication orders. (p 276 b-c) g
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[Debtor's appeals in encls. 18 and 23 dismissed with costs.]

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a Case(s) referred to:

Arab-Malaysian Finance Bhd v. Serajudin Mohd Ismail [1999] 6 CLJ 405 (**foll**)

Bathamani Suppiah v. Southern Finance Co Bhd [2000] 2 CLJ 650 (**refd**)

Chin Kon Nam & Anor v. Chai Yun Phin Development Sdn Bhd [1996] 1 CLJ 444 (**refd**)

Datuk Lim Kheng Kim v. Malayan Banking Bhd [1993] 3 CLJ 324 (**refd**)

b *Development & Commercial Bank Bhd v. Datuk Ong Kian Seng* [1995] 3 CLJ 359 (**refd**)

Hongkong Bank (M) Bhd v. Nor Harizan Mohd Ali [1999] 6 CLJ 466 (**refd**)

Re Chua Muk Kwee, ex p UMBC Finance Bhd [1994] 1 AMR 17 (**refd**)

Re Fong Yuan Kwong, ex p Public Bank Bhd [1996] 4 MLJ 42 (**refd**)

Re Khoo Kim Hock [1974] 2 MLJ 29 (**refd**)

c *Re Low Kok Tuan, ex p Arab Malaysian Merchant Bank Bhd* [1997] 4 CLJ 185 (**foll**)

Re Walter Su, ex p United Malayan Banking Co Bhd [1987] 1 MLJ 44 (**refd**)

Re Wong Chong Siong, ex p Arab Malaysian Finance Bhd [1999] 1 CLJ 222 (**refd**)

d *Supreme Finance (M) Bhd v. Mohamad Noor* [1993] 2 MLJ 29 (**foll**)**Legislation referred to:**

Bankruptcy Act 1967, s. 38(1)(a)

Bankruptcy Rules 1969, rr. 18, 95, 117

e *For the debtor - Merlyn Toh; M/s Bong & Co*

For the creditor - Wendy Langga; M/s Khoo & Co

Reported by Cindy Chan

JUDGMENT**f Sulaiman Daud JC:**

The judgment debtor ("the debtor") appealed against the decisions of the learned deputy registrar given on 22 June 2000 ordering the debtor's intention to oppose the petition to be set aside (encl. 18); and on 6 July 2000 granting the adjudication order and receiving order (encl. 23).

g Preliminary Objection

At the commencement of the hearing of the appeal, the learned counsel for the petitioning creditor ("the creditor") raised a preliminary objection on the *locus standi* of the debtor's counsel, Messrs. Bong & Co., to act for the debtor. The objection was based on s. 38(1) of the Bankruptcy Act 1967 ("the Act") which provides that a bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the official assignee. The learned counsel referred to the case of *Re Low Kok Tuan Ex p Arab Malaysian Merchant Bank Bhd* [1997] 4 CLJ 185, where Low Hop Bing J

i said at p. 189:

In my judgment, it is trite law that upon a person being adjudged a bankrupt, all his affairs become vested in the official assignee: Section 38(1)(a), Bankruptcy Act 1967 (“the Act”). This prohibition no doubt excludes an application by an undischarged bankrupt seeking an order of the court under ss. 92(1) and 105(1) of the Act to review, rescind or vary any order made by it: *Re Khoo Kim Hock supra*.

The learned counsel, relying on the aforesaid authority, submitted that since the debtor’s appeal herein is against the decision of the learned deputy registrar in dismissing his notice of intention to oppose the creditor’s petition, and in granting the receiving and adjudication order the exceptions as stated in *Re Khoo Kim Hock* [1974] 2 MLJ 29 do not apply. The learned counsel also cited the case of *Bathamani Suppiah v. Southern Finance Company Bhd* [2000] 2 CLJ 650 which followed with approval the decision in *Low Kok Tuan* in relation to a bankrupt’s capacity to maintain an action; and the case of *Chin Kon Nam & Anor v. Chai Yun Phin Development Sdn Bhd* [1996] 1 CLJ 444 which held that a bankrupt is not competent to maintain an action for breach of contract without prior sanctions of the official assignee.

The learned counsel for the debtor in opposing the preliminary objection firstly referred to the case of *Re Wong Chong Siong Ex p Arab Malaysian Finance Bhd* [1999] 1 CLJ 222, which I should say at once has no relevance to the point in issue. That case, among others, deals with the rules applicable for the purpose of computing time for filing an appeal under the Bankruptcy Rule. However in my view the other two cases referred to by the learned counsel support the proposition that a judgment debtor has the legal capacity to appoint counsel for the purpose of an appeal in a bankruptcy court. In the first case of *Supreme Finance (M) Bhd v. Mohamad Noor (t/a Everway Food Centre & Ors* [1993] 2 MLJ 29 Zakaria Yatim J (as he then was) said at p. 33:

In the presence case, it is my view that the words, “... shall be incompetent to maintain any action ...’ in s. 38(1)(a) of the Act refer to not only to writ action or any of the proceedings under O. 5 r. 1 but also refer implicitly to an application to set aside judgment in default. While the receiving and adjudication orders stand, the third defendant cannot contest the petitioning creditors judgment in any other court except the bankruptcy court. As a bankruptcy he has no *locus standi* to file the present application.

In the second case of *Re Khoo Kim Hock* [1974] 2 MLJ 29, Mohamad Azmi (as he then was), in determining the sanction requirement under s. 38(1)(a) of the Act, stated at p. 30 as follows:

- a* ... It is my considered opinion that the sanction requirement does not apply to cases where the bankrupt is seeking to challenge an order in bankruptcy, or where he is applying to be discharged or where he is seeking the court's discretion to review, rescind or vary any order made under its bankruptcy jurisdiction.
- b* Having considered the provisions of the Bankruptcy Act as a whole, in particular the said s. 38(1)(a), in the light of the principle adopted in the last two preceding authorities, I am of the view that the requirement of the sanction under the said section does not apply to the present case where the bankrupt is appealing against the order of the learned deputy registrar in setting aside the debtor's intention to oppose the petition, and in granting the receiving order adjudication order. From the debtor's affidavit it is clear that the debtor is seeking to challenge or contest the judgment to which the petition relates in the bankruptcy court on the ground that it is illegal, null and void and that the amounts claimed are excessive and contrary to the judgment. It is obvious that such an appeal, if allowed, will have the effect of rendering all orders made prior thereto, including the receiving order and adjudication order, to be void and of no effect. The present application also does not relate to any thing or matter which has been vested to the official assignee so as to require its prior sanction. An undischarged bankrupt is also entitled to engage an advocate and solicitor to represent him in any action in cases where the provisions of s. 38(1)(a) of the Act does not apply or where the cause of action does not vest in the official assignee (see *Re Khoo Kim Hock*). For these reasons I overruled the preliminary objection.
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- f* **Enclosure 18 – Notice Of Intention To Oppose The Petition**
- The chronology of events from the act of bankruptcy to the grant of the receiving and adjudication orders can be briefly stated as follows. On 17 December 1999 the creditor personally served on the debtor a bankruptcy notice dated 5 October 1999 demanding for the payment of a final judgment in the sum of RM12,345.72 obtained in the Magistrate Court in Summons No MC/CS/134/1942 dated 7 November 1992. When the debtor failed to comply with the said notice, a creditor's petition for receiving and adjudication orders was presented on 23 February 2000 and served personally on the debtor on 20 March 2000. In the petition, the creditor claimed that the debtor is truly indebted to the creditor in the aggregate sum of RM12,345.72 accruing from such final judgment in the sum of RM5,283.45 together with interest thereon at the rate of 1.5% per month from 27 February 1992 until full payment. In the petition it was also alleged that the debtor has within six months before the date of the presentation thereof committed the act of bankruptcy by failing to comply with the said bankruptcy notice which require the debtor to pay the said sum of RM12,345.72 within seven days of the service of the notice.
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The debtor Chin Sin Lan, by an affidavit affirmed on 25 March 2000 (“the debtor’s first affidavit”), prayed for an order that the creditor’s petition be dismissed on the ground that the amount claimed are excessive and exorbitant, and is contrary to the judgment. It was also asserted that the said judgment in purporting to award interest at 1.5% per month from 27 February 1992 until full payment is illegal, null and void. The said affidavit was served on the creditor’s advocate on 28 March 2000. On 10 April 2000 the debtor’s solicitor presented a “Notice by Debtor’s Solicitor of Debtor’s Intention to Oppose the Petition” which was served on the creditor on the same day. Subsequently the debtor presented another notice under his name pursuant to r. 117 of the Bankruptcy Rules 1969 (“the Bankruptcy Rules”) of his intention to oppose the petition. The said notice which was undated was filed on 2 May 2000 and was served on the creditor on the same day.

Apart from the affidavit affirmed on 25 March 2000, the debtor also affirmed another affidavit in reply on 2 May 2000 (“the debtor’s second affidavit”). The creditor, through its branch manager, filed in two affidavits which were affirmed on 17 April 2000 (“the creditor’s first affidavit”) and 9 May 2000 (“creditor’s second affidavit”).

At the hearing of this appeal the learned counsel for the creditor submitted that, among others:

- (a) the debtor’s first affidavit dated 25 March is bad in law as it does not contain a counterclaim or set-off or cross demand.
- (b) The first “notice by the debtor’s solicitor of the debtor’s intention to oppose petition” is void for non-compliance with Form 16 of the Bankruptcy Rules (“the first notice”).
- (c) The second undated notice made under r. 117 of the Bankruptcy Rules is also void for non-compliance with the Bankruptcy Rules (“the second notice”).

The first issue that arises from the aforesaid submission is whether the debtor’s first affidavit dated 25 March 2000 praying for an order that the creditor’s petition be dismissed was filed in accordance with the provisions of the Bankruptcy Rules. It is obvious that the debtor’s first affidavit was intended to oppose the creditor’s petition to which r. 117 of the Bankruptcy Rules is applicable. The said r. 117 provides as follows:

117. Where a debtor intends to show cause against a petition he shall file a notice with the Registrar specifying the statements in the petition which he intends to deny or dispute and transmit by post or otherwise to the petitioning creditor and his solicitor if known a copy of the notice three days before the day on which the petition is to be heard.

- a* Such notice must be in Form 16 as set out in the Appendix to the Bankruptcy Rules and has to be issued by the debtor under his name. In view of the requirement for such notice to be made in the prescribed form, it is obvious to me that the said affidavit will not in itself constitute a notice of intention to oppose the petition even though it stated the grounds why the creditor's petition should be dismissed (see *Chua Muk Kwee, Re: Ex parte UMBC Finance Berhad* [1994] 1 AMR 17. The filing of such affidavit is only proper in the case proceedings which relate to the setting aside of a bankruptcy notice (see r. 95 of the Bankruptcy Rules).

- c* However the learned counsel for the debtor sought to remedy the procedural defect by filing a "notice by the debtor's solicitor of the debtor's intention to oppose petition" which for the purpose of convenience is reproduced as follows:

**NOTICE BY DEBTOR'S SOLICITOR OF
DEBTOR'S INTENTION TO OPPOSE PETITION**

- d* TAKE NOTICE that the said CHIN SIN LAN intends to oppose the making of the Receiving and Adjudication Orders as prayed, and that he intends to contend that DELTA FINANCE BERHAD, (Co. No. 008807-A) the Petitioning Creditor is not entitled to present the Creditor's Petition upon the grounds as set forth in the affidavit affirmed on the 25th March 2000 and that the said facts deposed to are sufficient cause why no order herein should be made.

Dated this 10th day of April, 2000.

- f* (sgd)
M/s Bong & Co. Advocates
Advocates for the Debtor

- g* The said notice gave rise to two further questions to be answered, firstly whether the said notice to oppose may be made by and in the name of the debtor's advocate as in the instant case, and secondly whether the grounds for such opposition can be set out in an affidavit which was affirmed and filed two weeks earlier than the filing of the notice itself. With regard to the first question, the said r. 117 clearly stipulates that "where a debtor intends to show cause against a petition he shall file a notice with the registrar ...". From the wording of the said rule it is clear to me that the Form 16 notice must be made in the name of the debtor personally and not that of the advocate acting on his behalf. Although the said notice appeared to have been filed substantially in the format of Form 16 but in my view it is still not in conformity with the requirements of the said r. 117 as it was not issued in the name of the debtor personally.
- i* I will deal with the question relating to the affidavit when I consider the validity of the second notice filed by the debtor.

After having filed the said affidavit and the first notice the debtor proceeded to file a second undated notice which followed the format in Form 16 except that it did not specify the statement in the petition which he intends to deny or dispute. Instead it makes reference to the debtor's first affidavit and relied on the ground set forth therein in opposing the making of the receiving and adjudication orders. The learned counsel for the creditor contended that the said notice is also invalid on two grounds, firstly the debtor fails to specify the statement in the petition which he intends to object and secondly the debtor's first affidavit used in support thereof also fails to specify the ground for disputing the creditor's petition. Before I gave further consideration to such contentions I will first consider the admissibility of the debtor's first affidavit in support thereof which was affirmed about five weeks earlier. As can be seen the affidavit was not only affirmed five weeks prior to the filing of the second notice but it was also filed and served to the creditor on the date of its affirmation. In *Arab-Malaysian Finance Berhad v. Serajudin bin Mohd Ismail* [1999] 6 CLJ 405 it was held that an affidavit which was affirmed and filed before the OS is filed is invalid and inadmissible since to hold otherwise would tantamount to putting the proverbial cart before the horse. However in *Hongkong Bank (M) Bhd v. Nor Harizan bte Mohd Ali* [1999] 6 CLJ 466 it was ruled otherwise. In that case it was held that an affidavit used in support of an originating summons is not defective or inadmissible by reason only that the deposition thereof preceded the filing of the summons.

The facts of the case before me in so far as it relates to the affirmation and filing of the affidavit is almost similar to that in *Arab-Malaysian Finance Berhad* where from the judgment thereof it can be inferred that the affidavit in question was not only affirmed before the date of filing of the OS but was also filed prior thereto. At the time of filing of the debtor's first affidavit it is obvious from the act of debtor's counsel in filing the first notice that the said affidavit was never at any time intended by the debtor to be used in support of the second undated notice which was filed five weeks later. In my view the debtor's first affidavit even though referred to in the second notice cannot be taken as an affidavit in support thereof. The second notice even if it is regular and in conformity with the requirements of r. 117 stands unsupported with any grounds and the present appeal can be dismissed on this ground alone.

However if I am wrong in so deciding, the next remaining question to be answered is whether the debtor's intention to oppose the petition in such a manner is in compliance with the requirements of the Bankruptcy Rules. In the case of *Datuk Lim Kheng Kim v. Malayan Banking Berhad* [1993] 3 CLJ 324, Mohamed Dzaidin SCJ (as his lordship then was), in delivering the ground of decision of the Supreme Court stated at p. 328:

- a* Rule 117 provides that where a debtor intends to show cause against a petition, he shall file a notice specifying the statements in the petition which he intends to deny or disputes. The format of the notice of intention to oppose the petition is given in Form 16 of the Rules

His lordship added, in the same page and at p. 329:

- b* Bearing in mind that this ‘affidavit in opposition’ was filed one month after the creditor’s petition was served on him and contained multitude of grounds other than the existence of a counter-claim or set-off or cross demand, he should have made a formal application by motion supported by this affidavit in compliance with r. 18 which reads:

- c* Application to be made by motion.

Except where these Rules or the Act otherwise provides, every application to the Court shall, unless the Court otherwise directs, be made by motion supported by affidavit.

- d* In our opinion, failure on the part of the appellant to follow r. 18 renders his ‘affidavit in opposition’ ineffective and bad in law because unless the court otherwise directs, challenges to the creditor’s petition or bankruptcy notice other than counter-claim, set-off or cross demand which equals or exceeds the judgment debt, must be made by filing a notice of motion supported by an affidavit. Unfortunately he has failed to do so in this case.

- e* The decision in *Datuk Lim Kheng Kim v. Malayan Banking Berhad* was followed with approval by the Federal Court in the case of *Development & Commercial Bank Berhad v. Datuk Ong Kian Seng* [1995] 3 CLJ 359, where Mohamed Dzaiddin FC) (as his lordship then was), in delivering the decision of the said court again stated at p. 365:

- f* In *Datuk Lim Kheng Kim*, the Supreme Court held that failure to follow r. 18, which requires the application to be made by motion supported by affidavit, renders an affidavit in opposition ineffective and bad in law because unless the court otherwise directs, challenges to the creditor’s petition or bankruptcy notice other than that the debtor has a counterclaim, set-off or cross-demand which equals or exceed the judgment debt, must be made by filing a notice of motion supported by an affidavit. This court has no reason to disagree with the decision and will follow it.

- g* In the present appeal, even if the debtor’s first affidavit is regular and admissible, the failure on the part of the debtor to comply with the requirements of r. 18 of the Bankruptcy Rules will render his affidavit in support of the Form 16 notice ineffective and bad in law because the challenges to the creditor’s petition is not made on the ground that the debtor has a counterclaim, set-off or cross demand which equal or exceeds

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the judgment debt. In such a case the challenge must be made, in addition to the filing of the Form 16 notice, by filing a notice of motion supported by an affidavit. Such non-compliance is a breach of mandatory rule which cannot be described as a formal defect or an irregularity which can be cured. In the absence of such notice of motion and the affidavit in support the debtor could not show cause against the petition and the debtor's appeal should be dismissed on this ground alone.

In spite of the fundamental defect in the debtor's notice to oppose the petition, the learned deputy registrar proceeded to hear the debtor's second notice. Upon hearing the submission of both parties the learned deputy registrar, following the case of *Re Fong Yuan Kwong ex p Public Bank Bhd* [1996] 4 MLJ 42, dismissed the said notice on the ground that the dispute or discrepancy in the amount actually due or in the judgment to which the notice relates should be raised at the bankruptcy notice stage within the time frame stipulated therein. I fully agree with his finding. I am also of the view that the learned deputy registrar has correctly applied the correct principle as laid down in *Re Walter Su Ex Parte United Malayan Banking Corp. Bhd.* [1987] 1 MLJ 44 in making his finding that there is no evidence before him that the judgment in question has been obtained by fraud or collusion or that there has been some miscarriage of justice.

Accordingly I dismissed the appeal in encl. 18 with costs.

Enclosure 23

I will next consider the appeal on the decision of the learned deputy registrar given on 6 July 2000 granting the receiving and adjudication orders. The debtor's notice of intention to oppose the creditor's petition was heard by the learned deputy registrar on 11 May 2000. On 22 May 2000 he delivered his ruling in favour of the creditor whereupon the debtor applied orally for stay of execution. The learned deputy registrar rightly held that the application for stay is premature as no adjudication order has been made and the hearing of the creditor's petition was then adjourned to 6 July 2000. At the hearing on 6 July 2000 he granted the receiving and adjudication orders and fixed the hearing of the debtor's application for stay in the afternoon of the same day.

Before me the learned counsel for the debtor submitted that the learned deputy registrar has erred in law in granting the receiving and adjudication orders on the grounds that firstly the granting of the adjudication order was unjustified because the creditor's claim are excessive for compounding interest; secondly the official assignee, who was not present at the hearing,

a had not confirmed that the bankruptcy papers were in order; and thirdly the creditor has not established their claim and that the learned deputy registrar has not considered all the objections raised by the debtor.

b In view of my earlier finding that the debtor's failure to comply with the requirements of r. 18 and r. 117 of the Bankruptcy Rules constitute fundamental defects which cannot be cured, the debtor cannot now be allowed to challenge the validity of the judgment to which the bankruptcy notice relates or the subsequent receiving and adjudication orders on the grounds specified in (a) and (c) above by using the same notice and affidavits which were irregularly made. With regard to ground in (b) above,

c there is nothing in the Act or the Bankruptcy Rules which requires the official assignee to confirm that the bankruptcy papers are in order before the grant of the receiving or adjudication orders. Even if there is such requirement the objection raised by the learned counsel is merely statement from the bar which is not supported by any affidavit evidence.

d Accordingly the appeal in encl. 23 is also dismissed with costs.

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